Supreme Court of the United States

OCTOBER TERM, 1965

No. 545

JOSEPH E. SEAGRAM & SONS, INC., *et al.*,
Appellants,

v.

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WALTER C. SCHMIDT, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANTS' PETITION FOR REHEARING

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Appellants, on the grounds following, respectfully petition for rehearing of so much of this Court's judgment as holds Sec. 9 of Chap. 531, 1964 Session Laws of New York, on its face constitutional.

A new rule appears to have been announced, although not briefed or orally argued before this Court, to wit, where a state economic regulation has been stayed, this Court will confine its consideration of constitutional issues to the face of the state statute—even where the state courts have first expressed their own views of the Constitutional issues in terms of the statute's probable and possible effects. The practical consequence of such a rule is to cast both declaratory judgment and injunctive proceedings into disrepute as means of prudently taking the measure of a new statute while maintaining the *status quo*. In order to test the

propriety of a new state statute against its likely effects, this new rule requires proceeding at one's peril.

Plaintiff-appellants had assumed that a declaratory judgment was the appropriate way to test a statute. Like the language of the Federal Declaratory Judgment Act, 28 U. S. C. § 2201, the New York Declaratory Judgment Act, CPLR § 3001, permits a court to render a judgment as to "the rights and other legal relations of the parties to a justiciable controversy . . ."

Does this procedure extend to questions of constitutionality? According to Borchard, *Declaratory Judgments* (2nd ed. 1941) at 766:

> "Possibly no form of written instrument is more susceptible of construction and interpretation by declaratory judgment than statutes. Nor, where constitutionality may be raised, is there more necessity for simplicity of adjudication for the individual and the community who must know at the earliest opportunity whether they are living under constitutional or unconstitutional laws, for delay may bring uncertainty and difficulties of all kinds."

Borchard was not unaware of the objection that constitutional questions would thus be decided in a vacuum. But, as he points out,

> "In passing upon statutes, the Supreme Court, like other courts, may construe or interpret the statute or constitution from internal evidence of its meaning (in some factual setting) or may *apply* the statute or constitution to a varied combination of external facts.[15c] This second function, perhaps the more frequently

[15c] Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 52 Sup. Ct. 443, 448 (1932), in dissenting opinion of Brandeis, J. See also Frankfurter and Landis, The Business of the Supreme Court (1927) 307 *et seq.*

> exercised, involves the application to complex facts of such concepts or standards as due process, equal protection, interstate commerce, reasonable, etc., and necessarily presupposes a full presentation of the facts, the adequate appreciation of which is the main element in the case." (*Id.* at 768.)

Mindful of this Court's admonitions, under the abstention doctrine, that it should not be asked to pass on constitutional issues in the absence of authoritative interpretation by the state courts of a state statute's meaning and incidence, plaintiff-appellants commenced this action in the courts of New York rather than in the Federal district court. See *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941).

Ultimately appellants obtained an authoritative local interpretation* of the scope of § 9 by a majority of the Court of Appeals—ruling on the occasion for the statute, the supposed vice at which it was aimed, and the permissible scope of its effects.

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* The action was initiated in Supreme Court, Albany County, on October 28, 1964. The provisions of Chapter 531 and the amendment to Rule 16, were due to become effective on October 31, 1964. Rule 16 as amended, called for affirmations to be filed by December 1, 1964. Appellants' application for a temporary restraining order pending a hearing on a motion for preliminary injunction, was sought and granted on October 29, 1964. Although plaintiffs sought declaratory judgment and injunctive relief, the case has never been tried. In response to plaintiffs' motion for a temporary injunction, defendants moved to dismiss the complaint and cross-moved for declaratory judgment. The Supreme Court, Albany County, considering the matter on the basis of affidavits and exhibits, denied the motion to dismiss the complaint, granted defendants' motion for declaratory judgment, denied plaintiffs' application for preliminary injunction and vacated the interim stay which plaintiffs initially secured. However, the state courts appeared to have been sufficiently satisfied with the Record. See *Joseph E. Seagram* v. *Hostetter*, 23 App. Div. 2d 933, 259 N. Y. S. 2d 644, 646 (3rd Dept. 1965) (*per curiam*) (". . . it . . . is presented upon an adequate record . . ."). Stays were granted subsequently by Chief Judge Desmond, and by Mr. Justice Harlan.

As for the occasion of the regulation, the majority of the Court of Appeals found that in some out-of-state markets the retail price for a brand of liquor was lower than the wholesale price of that brand in New York. 16 N. Y. 2d at 54.

As for the supposed vice, according to the majority of the Court of Appeals, Sec. 9 was aimed at "discrimination by the liquor industry against the New York consumer which, as the [Moreland Act] commission had found, cost the New York consumer $150 million a year above that which a free market would have offered." 16 N.Y. 2d at 55.

As for the object, the majority of the Court of Appeals found that Sec. 9 was intended "to keep down the prices of brand liquors to the customer." 16 N.Y. 2d at 55.

As to the likely effects of Section 9, the majority of the Court of Appeals was fully prepared to discuss the probable practical results of operations under the Statute:

The change to

> "a possibly sparse profit situation may make it economically difficult for the liquor industry. If it does it is within the competence of the New York Legislature to make it that way." (*Id.* at 56.)
>
> "...
>
> "If the conditions set down by the Legislature are economically impossible for the liquor industry to meet, it will have to accept this impossibility. But we are of the opinion that they are not economically impossible and that the effect of the 1964 statute will be to reduce liquor profits and pass the benefit of some of them on to New York consumers." (*Id.* at 56.)
>
> "...
>
> "Under section 9 the distillers themselves control the base price since they fix the lowest price else-

where. *If its effect on New York is too low a price they have it within their power to raise the lowest price elsewhere.* The industry must absorb any differential cost in doing business as one of the incidents to a highly regulated industry. The incidental effect of this on prices in another state does not invalidate the New York statute." [*Emphasis* supplied] (*Id.* at 57.)

The majority of Court of Appeals, after considering the possible effects, thus upheld the statute under both the New York and Federal Constitutions. Plaintiffs appealed.

Though plaintiff-appellants' arguments have been directed toward the likely effects of the statute as interpreted by the highest court in New York, they are now told by the Supreme Court that the statute may be considered only on its face. This amounts to holding—without citation of prior holding and contrary to such authorities as Borchard—that neither a declaratory judgment nor a proceeding for an injunction is an effective means of testing the constitutionality of a state statute if the decisive issue may be the effect of the statute. In simplest terms, the Court holds the case premature. Contrast Pugh, "The Federal Declaratory Remedy: Justiciability, Jurisdiction and Related Problems," 6 Vand. L.R. 79, 92-6 (1952).

Equally, the effect of the Court's decision is to undercut the rationale of the abstention doctrine. Appellants have not asked this Court to make "preliminary guesses regarding local law."* They sought a definitive interpretation from the state's highest court so as to present, if need be, the federal constitutional issues "in clean-cut and concrete form, unclouded by any serious problem of construction

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* *Spector Motor Service Co.* v. *McLaughlin*, 323 U. S. 101, 105 (1944).

relating either to the terms of the questioned legislation or to its interpretation by the state courts.'"* They took care to advise the Court of Appeals of their claims under the Constitution of the United States as well as the New York Constitution.**

The majority of the Court of Appeals held that § 9 was valid under both the New York and Federal Constitutions, irrespective of whether, for example, the direct consequence of this regulation is a general increase in the price level across the country or not. Appellants have contended that, as construed by the majority of the Court of Appeals, § 9 is unconstitutional.

Appellants believe that the decision of the Court of Appeals resolves any questions of interpretation which might avoid or postpone the serious federal constitutional questions presented: on the assumptions made by the Court of Appeals as to its effect, is § 9 constitutional? Having obtained precisely the kind of ruling called for by the abstention doctrine, appellants are now treated to the kind of formula which the Court might well apply in the absence of the abstention doctrine.

Previously this Court has often inquired into the effect of a statute upon interstate commerce even where the statute does not discriminate on its face and the case is heard in the context of a proceeding for a declaratory

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* *Rescue Army* v. *Municipal Court of Los Angeles,* 331 U. S. 549, 584 (1947).

** Compare *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411, 420 (1964).

judgment or injunctive relief,* e.g. *Dean Milk Co.* v. *City of Madison,* 340 U.S. 349, 354 (1951) (state proceeding to enjoin city prohibition against sale of milk pasteurized more than five miles from the city); *Parker* v. *Brown,* 317 U.S. 341 (1943) (federal suit to enjoin officials of state marketing program from enforcing restrictions against a California raisin producer and packer); *Currin* v. *Wallace,* 306 U.S. 1 (1939) (federal suit instituted by tobacco warehousemen and auctioneers seeking declaratory judgment and injunctive relief against inspection act); *Carter* v. *Carter Coal Co.,* 298 U.S. 238 (1936) (stockholder's suit brought in federal court to enjoin company from accepting, and to enjoin governmental officials from enforcing, the Coal Code called for by the conservation act); *Baldwin* v. *G.A.F. Selig,* 294 U.S. 511 (1935) (federal suit to restrain enforcement of state licensing and penalty procedures). And see *Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525 (1949) (appeal from denial of application for a license for an additional receiving depot).

The Court makes much of the fact that because the amendment has been stayed, the effects of the statute are too speculative to rise to problems of Constitutional dignity. If attack by way of declaratory judgment and injunction means that consideration of the constitutional issues may go no further than those which the statute raises on its face, implicit in the Court's reasoning is the view that in this posture of the case, the amendments must be assumed to

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* It will be recalled that the case announcing the scope of the 21st Amendment in broadest terms and upholding state regulations imposing a fee for the privilege of importing beer, was decided in the context of an injunctive proceeding, the regulations having been stayed when the Court heard the case. *State Board of Equalization* v. *Young's Market Co.,* 299 U. S. 59, 60 (1936).

have the minimal effect.** There is not that much dispute in the record as to the facts. Defendant-appellees and the majority of the Court of Appeals have indicated little concern as to the effects—whatever they are, the statute remains constitutional.

There are only two likely alternatives. Either

a) wholesale prices in New York will come down, or

b) wholesale prices throughout the rest of the country will go up.

If prices in New York go down by the margin of the figures relied upon by the Moreland Commission, then it is clear that wholesalers in New York will be selling below cost. This will inevitably squeeze out the less efficient wholesalers first, but permit the stronger ones to struggle on —for a while longer. This could well constitute a case of primary line injury in violation of the Robinson-Patman Act. This Court seems to recognize that the Supremacy Clause would be violated:

> "Although it is possible to envision circumstances under which price discriminations proscribed by the Robinson-Patman Act might be compelled by § 9, the existence of such potential conflicts is entirely too speculative in the present posture of this case to support the conclusion that New York is foreclosed from regulating liquor prices in the manner it has chosen.[15]" [Footnote omitted] (Slip opinion, pp. 9-10)

** This is the first time that a court has gone so far as to suggest that the threat of irreparable injury is not real or substantial. To the extent that the issues should come up in more concrete contexts other constitutional issues are likely to be added.

Or, alternatively, wholesale prices throughout the rest of the country will go up. This Court seems to recognize that the Commerce Clause would then be burdened:

> ". . . The serious discriminatory effects of § 9 alleged by appellants on their business outside New York are largely matters of conjecture. It is by no means clear, for instance, that § 9 must inevitably produce higher prices in other States, as claimed by appellants, rather than the lower prices sought for New York. It will be time enough to assess the alleged extraterritorial effects of § 9 when a case arises that clearly presents them." (Slip opinion, p. 7)

If the relevant Constitutional test calls for a weighing of effects—as, for example, with Commerce Clause questions, it is a little hard to see how the Supreme Court can reject the balance struck by the Court of Appeals as unrealistic (though appellants would agree that it is unrealistic) and—without striking a different balance—purport to give declaratory judgment *on the face of the statute* alone. The recognized test has little to do with the face of the statute.

Although appellants invoke the Commerce Clause—which requires a balancing of burden v. benefit—the effect of this Court's instant ruling is to hold that the statute may not be attacked until the burden has occurred. Contrast *e.g. Pennsylvania* v. *West Virginia,* 262 U. S. 553 (1923).

The Court is asked here to construe two rather different kinds of "antitrust" statutes. In construing antitrust statutes in the past the Court has indicated a willingness to speculate as to the short and long range competitive consequences of particular kinds of transactions, e.g. pricing

tactics not yet put into effect, *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, 358 (1933); a twenty year requirements contract yet to be performed, *Tampa Electric Co.* v. *Nashville Co.*, 365 U. S. 320, 325 (1961) (declaratory judgment); and mergers which have not yet taken place, *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962).*

It is true that where the burden of a state regulation falls largely upon those outside a state, this Court is not bound by the findings of the state court; it may determine for itself the facts upon which an asserted federal right depends, *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 771 (1945). Thus had the Court of Appeals found a minimal impact outside of its borders, this Court would be free to draw its own conclusions. In fact, the Court of Appeals explicitly recognized that the statute's impact may fall almost entirely on other states. This Court's opinion argues that the statute is valid so long as the impact on other states does not become too "grave". "Grave" is hardly a talismanic word, nor is this the kind of guide by which one finds 'chairs one can sit on, tables one can write at'—or laws one can live by.

Moreover, although the Court is reluctant to speculate on the likely consequences of this statute on the prevailing level of liquor prices across the country—for the purposes of the Commerce Clause, it displays no timidity in predicting the likely consequences of the statute within the State of New York—for the purposes of construing the Equal Protection Clause. Appellants are at some loss to under-

* For the terms of the conditions under which ownership of Kinney passed to Brown but management remained independent, see *U. S.* v. *Brown Shoe Co., Inc.*, 1956 Trade Cases Par. 68,244 at p. 71,117 (E. D. Mo., E. Div.).

stand why visibility should be clearer down one Constitutional alley than the other.

It would seem that the Court should address as best it can the constitutional tests with the facts at hand. Alternatively, it should remand for additional proof of key legislative facts. See Karst, "Legislative Facts in Constitutional Litigation", 1960 Supreme Court Rev. 75.

While this Court should not be asked to give advisory opinions on hypothetical Constitutional questions, neither should it insist that a question of violating a criminal statute be faced only after someone has been sentenced or driven out of business.

CONCLUSION

This Petition for Rehearing should be granted, and the case set down for reargument on the regular calendar.

If, however, the Court believes that the Record as presently constituted could not, under any of the legal theories advanced, permit a weighing of the power of New York against the commercial rights of citizens of other states, or of the relative burdens on those engaged in the liquor industry as compared to the benefits which may be enjoyed by New York consumers, then, alternatively, the proceeding should be remanded to the courts of New York to provide appellants an opportunity to present evidence and obtain more definite findings on the points which the Court thinks crucial. See e.g. *Dean Milk Co.* v. *City of Madison*, 340 U. S. 349, 360 (1951) (Mr. Justice Black dissenting).

Respectfully submitted,

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The foregoing petition for rehearing is presented in good faith and not for delay.

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